COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2006-SC-00748-DG (Appeal)
NO. 2008-SC-000389-DG (Cross Appeal)

KIMBERLY G. HILL and ROBERT W. HILL APPELLANTS/CROSS-APPELLEES

APPEAL FROM COURT OF APPEALS
NOS. 2005-CA-00011 and 2005-CA-000183

and

JEFFERSON CIRCUIT COURT
THE HONORABLE STEPHEN P. RYAN
NO. 00-CI-04922

KENTUCKY LOTTERY CORPORATION APPELLEE/CROSS-APPELLANT

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT KENTUCKY LOTTERY CORPORATION

Jan M. West
GOLDBERG & SIMPSON, LLC
9301 Dayflower Street
Louisville, KY 40059
(502) 589-4440
COUNSEL FOR APPELLEE/
CROSS-APPELLANT
KENTUCKY LOTTERY CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Reply Brief of Appellee/Cross-Appellant has been served, via first class U.S. Mail, postage prepaid, this 30th day of March, 2009 to: Laurence J. Zielke, Keith B. Hunter, and Janice Theriot, PEDLEY, ZIELKE & GORDINIER, 2000 Meidinger Tower, Louisville, Kentucky; the Honorable Stephen P. Ryan, Judge, Jefferson Circuit Court, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202; and the Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40602-9230. I further certify that the record on appeal has not been removed from the office of the Jefferson Circuit Court Clerk.

Jan M. West w/ permission
COUNSEL FOR APPELLEE/ Liz Morris
CROSS-APPELLANT

TABLE OF POINTS AND AUTHORITIES

Appellee/Cross-Appellant, Kentucky Lottery Corporation ("KLC"), submits this Reply to the Response/Reply Brief of Appellants/Cross-Appellees, Kimberly and Robert Hill ("Hills' Response/Reply").

ARGUMENT[1]

I. The Hills' Defamation Claim Should Have Been Dismissed Based On KLC's Absolute Privilege For Disclosures Required By The Kentucky Open Records Act.

The Hills argue that to avail itself of a privilege defense to their defamation claim, KLC must show that it was "required both to create and to produce" the termination memoranda containing the allegedly defamatory publication *and* that the publication was made by an official at a level comparable to an "executive head of a department of state government." (Hills' Response/Reply, pp. 18-23). Whether done intentionally to cloud the issue or because of a fundamental misunderstanding of the law, the Hills completely misstate the law concerning privilege as a defense to defamation.

Simply put, an author's state of mind in creating a document containing allegedly defamatory statements is irrelevant to the elements of a defamation claim and to the privilege defense. To sustain a claim for defamation, a plaintiff must establish the existence of (1) defamatory language, (2) about the plaintiff (3) which is published and (4) which causes injury to reputation. *McBrearty v. Ky. Cmty. & Tech. Coll.*, 262 S.W.3d 205, 213 (Ky. App. 2008). "Defamation is a quasi-intentional tort, i.e. with the exception

[1] CR 76.12(4)(b)(ii) states that a reply brief shall be no more than 10 pages in length and that a brief combining a reply and a response to a cross-appeal shall not exceed 25 pages. Thus, while a combined reply/response brief may be up to 25 pages long, the reply portion of the brief may not exceed 10 pages. Here, the Hills devoted 16 1/2 pages of their combined Response/Reply to their "reply" in support of the arguments raised in their motion for discretionary review. The Hills, therefore, violated the page-limit rules for reply briefs in an effort to gain unfair advantage. The Court should disregard the arguments on pages 11-16 of the Hills' Response/Reply to avoid condoning such abuse. In addition to violating the page-limit rules, the Hills' Reply is also replete with misstatements of law, fact and the arguments made by KLC in its Brief of Appellee/Cross-Appellant to this Court. Nevertheless, the rules do not permit KLC a surreply to address these errors, and the KLC will not skirt the rules by discussing them in this Reply.

of the element of publication, its basis is in strict liability." *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 273 (Ky. App. 1981). With respect to the publication element, a plaintiff must show that the publication -- not the creation of the document at issue -- was either negligent or intentional. *Id.* **"The emphasis is not upon the meaning of the remarks as being negligently or intentionally defamatory but rather upon the manner in which such remarks were conveyed."** *Id.* at 273-74 (emphasis added).

So, try as the Hills might to villify the preparation of their termination memoranda, the alleged manner in which they were placed in the Hills' personnel files, and the Open Records Act disclosure of those documents, only the Open Records Act disclosure is at issue in the privilege analysis.

A. Privilege Is A Complete Defense To An Action For Defamation.

Where disclosures are subject to absolute privilege, the privilege is a complete defense to a defamation action and liability does not attach, regardless of falsity or malice in the communications themselves. *Massengale v. Lester*, 403 S.W.2d 701, 702 (Ky. 1966). The existence of absolute privilege is a question of law. *Rogers v. Luttrell*, 144 S.W.3d 842, 844 (Ky. App. 2004).

Qualified privilege, on the other hand, protects a defendant from liability unless it waived the privilege by publishing the allegedly defamatory statement with "actual malice." *Columbia Sussex Corp.*, 627 S.W.2d at 273, 275. Where qualified privilege exists, a defendant cannot be held liable for a mere mistake or negligence in connection with the communication. *McCollum v. Garrett*, 880 S.W.2d 530, 534 n.6 (Ky. 1994). The defendant's motive in creating the document is of no consequence. Rather, the plaintiff must prove that the defendant intentionally waived the privilege by **publishing** the document with knowledge of falsity or a reckless disregard for the truth (*i.e.*, a high degree

of awareness of probable falsity such that the publisher entertained serious doubt as to the truth of the publication). *Weinstein v. Rhorer*, 240 Ky. 679, 42 S.W.2d 892, 894 (1931); *Ball v. E.W. Scripps Co.*, 801 S.W.2d 684, 689 (Ky. 1990). While the existence of privilege is a question of law, the determination of whether the privilege has been waived (*i.e.*, through publication with actual malice) is factual and "a jury should be instructed accordingly." *Columbia Sussex Corp.*, 627 S.W.2d at 276.

B. A Publication Required By Law Is Absolutely Privileged And Cannot Serve As The Basis For Liability In A Defamation Action.

The RESTATEMENT (SECOND) OF TORTS § 592A (1977) provides that "[o]ne who is required by law to publish defamatory matter is absolutely privileged to publish it." An absolute privilege applies whenever an allegedly defamatory communication is made in discharge of a duty imposed by law. *See Matthews v. Holland*, 912 S.W.2d 459, 461 (Ky. App. 1995) ("a public official acting under express authority of law . . . is entitled to absolute immunity from a defamation action"); *Compton v. Romans*, 869 S.W.2d 24, 26 (Ky. 1993) ("absolute immunity from defamation actions is available to certain governmental officials with respect to matters upon which the law requires them to act").

Here, KLC published the allegedly defamatory termination memoranda in response to a request made by WLKY television station under the Kentucky Open Records Act, KRS 61.870, *et seq.*, seeking the Hills' personnel files, specifically including the dismissal letters which form the basis of the Hills' defamation claims. (*See* Plaintiffs' Trial Exhibit 7; 12/2002 Trial). As recognized by the trial court, KLC had a statutory duty to provide the memoranda to WLKY, unless the documents were exempt from disclosure.

KRS 61.880(1). (Opinion and Order, p. 4, Record, p. 1463, attached to the Hills' Brief at Tab 8).[2]

C. The Termination Memoranda Were Not Subject to Any Open Records Disclosure Exemptions.

The Hills argue that KLC was not required to disclose the termination memoranda to WLKY because the documents fall within disclosure exemptions in the Open Records Act. (Hills' Response/Reply, p. 21). But public employee records, even those containing information of a personal nature, are not exempt from disclosure. *Palmer v. Driggers*, 60 S.W.3d 591, 598-99 (Ky. App. 2001). And, although the termination memoranda were drafted prior to the Hills' termination and were initially preliminary, once KLC took the final action of terminating the Hills' employment, the termination memoranda were not exempt from disclosure under KRS 61.878(1)(f). *See Ky. State Bd. of Med. Licensure v. Courier-Journal & Louisville Times Co.*, 663 S.W.2d 953 (Ky. App. 1983). As such, upon receipt of the Open Records Act requests from both the Hills and WLKY, KLC was compelled by law to produce the termination memoranda. Indeed, had it not done so, KLC would have been subject to a lawsuit by WLKY under KRS 61.882. Accordingly, KLC's publication of the memoranda to WLKY was absolutely privileged. The Hills' defamation claim, therefore, should not have been submitted to the jury, but dismissed as a matter of law.

[2] KLC is subject to the Open Records Act and is required by its enabling statutes to provide documents in response to Open Records Act requests. *See* KRS 154A.010 ("all records of [KLC] shall be deemed open records and subject to public inspection."); KRS 61.872 (requiring that public records retained or possessed by a public agency be open for inspection).

D. If A Privilege Exists That Is Not Absolute, The Failure To Instruct The Jury On The Issue Of Privilege Is Prejudicial Error.

The record reflects that KLC asserted the privilege defense throughout the trial court proceedings. (KLC Brief, pp. 19-20). But, citing this Court's decision in *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 163-64 (Ky. 2004), the Hills argue that KLC failed to preserve the issue of its entitlement to a privilege instruction because its tendered instruction, requiring the jury to find in favor of the Hills only if it determined that KLC's actions were not privileged, was insufficient to inform the judge of its qualified privilege defense. (Hills' Response/Reply, p. 18).

Neither this Court, nor its predecessor Court, have adopted such a narrow preservation requirement. Indeed, as this Court held in *Sand Hill Energy*, if a party's offered instruction fairly presents the party's position, further action is generally not required to preserve for review the trial court's error in failing to give a requested instruction. *Id.* at 163. And this Court's predecessor expressly recognized that a defendant's tendering of instructions on the theory of privilege "was enough to require a proper instruction on that theory" rendering the trial court's failure to instruct on privilege to be prejudicial error. *Massengale*, 403 S.W.2d at 703.

KLC has maintained throughout this litigation that it is entitled to privilege as a defense to the Hills' defamation claim. The existence of absolute privilege is a purely legal question. *See, Rogers*, 144 S.W.3d at 844. Thus, there would never be a need to instruct on absolute privilege. Consequently, KLC's tendered instruction -- requiring the jury to find for the Hills only in the absence of privilege -- necessarily referred to qualified privilege. The Hills' argument that KLC failed to preserve the necessity of an instruction on privilege is simply wrong.

E. Qualified Privilege May Be Waived Only Upon The Plaintiff's Showing That The Defendant Published Defamatory Documents With Actual Malice.

It is the act of **publishing** a document with actual malice which causes the waiver of a qualified privilege. As this Court recognized in *Holdaway Drugs, Inc. v. Braden*, 582 S.W.2d 646, 649 (Ky. 1979), a "qualified privilege will be lost if the defendant **publishes** the defamation in the wrong state of mind." (emphasis added). Therefore, there is no liability for privileged publication of a defamatory document unless the plaintiff presents proof that the **publication** was made with actual malice. *Columbia Sussex Corp.*, 627 S.W.2d at 273 & 275; *Weinstein*, 42 S.W.2d at 894.

The Hills argue that the Court's holding in *Matthews v. Holland* requires that for the qualified privilege to attach, a defendant must show both a legal obligation to create the document, and a legal obligation to publish it. (Hills' Response/Reply, pp. 20-21). While the defendant in *Matthews* was required by law to provide the employee with a written statement containing the reasons for the non-renewal of the plaintiff's contract, that fact had nothing to do with the Court's holding. Rather, the Court's determination that the defendant was entitled to absolute privilege was based on its holding that the defendant:

> [d]id nothing more than he was required to do by KRS 161.120(2)(b) when he "**forward[ed] copies** of all relevant documents and records [relating to the nonrenewal of Matthews' contract] in his possession" to the Professional Standards Board. As a public official acting under express authority of law, he is entitled to absolute immunity from a defamation action.

912 S.W.2d at 461 (emphasis added). It is thus apparent that the privilege derived from the legal compulsion to produce the documents and that the motivation behind creating those documents was irrelevant to the Court's decision.

Here, while KLC may not have had a legal obligation to prepare memoranda setting forth its reasons for terminating the Hills, there is certainly no law prohibiting it from doing so. Moreover, KLC had no way of knowing, when the termination memoranda were created, that they would ever be subject to an Open Records request. Indeed, had the Hills and WLKY not made an Open Records request and the Hills had not filed suit, it is likely that the documents would never have seen the light of day.[3] KLC did not randomly distribute the memoranda or even voluntarily publish the documents. Rather, it produced them in response to Open Records requests from the Hills and WLKY. As set forth above, because it was legally obligated to produce the documents, KLC is entitled to absolute privilege for its actions. In the alternative, as the trial court determined, KLC was entitled to an instruction which required the Hills to prove to the jury that KLC waived the privilege by publishing the documents with actual malice.

F. A Defamation Privilege Extends To Any Person Or Entity Required By Law To Publish Documents Containing Defamatory Information, Not Just To Certain High-Ranking State Officials.

The Hills also argue that privilege as defense to defamation is available only to high ranking government officials, and that the individuals responding to the Open Records request here were not of sufficient rank to entitle KLC to a privilege defense. (Hills' Response/Reply, pp. 21-22). But the law conferring privilege for communications

[3] The Hills claim that they "were never given the chance to challenge the defamatory statements before they were released to WLKY and published to the world." (Hills' Response/Reply, p. 23). But the record reflects that the Hills' attorney made an Open Records request for their personnel files eight days before WLKY made its request. (Plaintiffs' Trial Exhibit 3A, 12/2002 Trial; Plaintiffs' Trial Exhibit 7; 12/2002 Trial). The timing of these Open Records requests, and WLKY's subsequent airing of the Hills' protest outside KLC headquarters (including two separate broadcasts interviewing the Hills), suggests that the Hills either knew, or should have known, that WLKY had or would request their personnel records. (KLC Brief, pp. 2-3). Persons affected by an Open Records request may challenge that disclosure to assert whatever exemption they believe applies. *Beckham v. Bd. of Ed. of Jefferson County,* 873 S.W.2d 575 (Ky. 1994).

made in discharge of a legal duty applies to anyone compelled by law to make such a publication. The grant of absolute privilege is:

> based chiefly upon a recognition of the necessity that certain persons, because of their special position or status, should be as free as possible from fear that their actions in that position might have an adverse effect upon their own personal interests. To accomplish this, it is necessary for them to be protected not only from civil liability but also from the danger of even an unsuccessful civil action. To this end, it is necessary that the propriety of their conduct not be inquired into indirectly by either court or jury in civil proceedings brought against them for misconduct in their position. Therefore the privilege, or immunity, is absolute and the protection that it affords is complete. It is not conditioned upon the honest and reasonable belief that the defamatory matter is true or upon the absence of ill will on the part of the actor. . . .

Gen. Elec. Co. v. Sargent & Lundy, 916 F.2d 1119, 1124 (6th Cir. 1990) (quoting RESTATEMENT (SECOND) OF TORTS, introductory note to "Title B. Absolute Privilege Irrespective of Consent," at 243).

The "special position or status" noted in *Sargent & Lundy* refers not to the person's rank or title, but to the legal duties being performed. As the United States Supreme Court noted in *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959):

> The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

(Citations omitted). Thus, the focus is on the duties performed, not to the title or office of the person performing them.

Here, KLC's vice president of human resources, Church Saufley, prepared the allegedly defamatory termination memoranda, which a KLC paralegal produced in response to WLKY's Open Records request. Neither Saufley nor the paralegal are parties

to this action. Rather, the Hills sued KLC. It is KLC that has the statutory obligation to produce information under the Open Records Act and it is KLC that is entitled to absolute privilege from liability for publishing allegedly defamatory statements which the Open Records Act compelled it to publish. *See Matthews*, 92 S.W.2d at 461; *Compton*, 869 S.W.2d at 26. *See also Burgess v. Paducah Area Transit Auth.*, 2006 WL 2228956 (W.D. Ky. Aug. 2, 2006) (privilege for production of document under Open Records Act); *Singleton v. Select Specialty Hosp.-Lexington, Inc.*, 2009 WL 192577 (E.D. Ky. Jan. 27, 2009) (privilege for report required to be made to Kentucky Nursing Board under KRS 314.031(4)).

II. KLC Should Be Exempt From Post-Judgment Interest Or, In The Alternative, It Should Be Entitled To A Greater Reduction In the Statutory Interest Rate.

The Hills were awarded damages against KLC solely for their KCRA retaliation claims. Under Kentucky law, KRS 360.040 -- the statute addressing post-judgment interest -- "has no application to judgments against state government or any of its subdivisions." *Kenton County Fiscal Court v. Elfers*, 981 S.W.2d 553, 560 (Ky. App. 1998). KLC's enabling statute, KRS 154A.020(1), deems it both a "political subdivision of the Commonwealth" and a "public agency." Accordingly, the Hills are not entitled to post-judgment interest on these awards, and the trial court should not have awarded such interest.

Moreover, despite the clear language of the trial court's order reducing post-judgment interest to 6% "[b]ased upon the evidence[4] presented by the Lottery at **a hearing**

[4] The Hills' argument that the trial court had no "evidence" to reduce judgment interest is also without merit, as the trial court could, and did, take judicial notice of the prevailing interest rate as determined by the Federal Reserve. (KLC Brief, at pp. 37-38).

before the Court on October 11, 2004,"[5] the Hills erroneously continue to insist that no such hearing took place while offering no proof to support their contention.[6] (Hills' Response/Reply, pp. 16-17). Moreover, no witness testimony or other formalities are required for a trial court to reduce post-judgment interest. *See Owensboro Mercy Health Sys. v. Payne*, 24 S.W.3d 675, 679 (Ky. App. 1999) (opinion ordered published by Kentucky Supreme Court) (affirming trial court's reduction of interest to 9% based solely on an affidavit supporting at 6% rate).

CONCLUSION

For the foregoing reasons and authorities, as well as those set forth in the Kentucky Lottery Corporation's Brief of Appellee/Cross-Appellant, KLC requests that this Court affirm the Opinion of the Court of Appeals, which affirmed the judgment entered by the trial court following the second trial, with the sole exception that interest may not be awarded against KLC.

Respectfully submitted,

Jan M. West
GOLDBERG & SIMPSON, LLC
9301 Dayflower Street
Louisville, KY 40059
(502) 589-4440

COUNSEL FOR APPELLEE/
CROSS-APPELLANT
KENTUCKY LOTTERY CORPORATION

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[5] The trial court's December 28, 2004 Opinion, p. 5, attached to the Hills' Brief at Tab 9 (emphasis added).

[6] *Compare Oakes v. Oakes*, 204 Ky. 298, 264 S.W. 752, 753 (1924) ("Every presumption is in favor of the correctness of the decision of the trial court, and in order to warrant a reversal, error must affirmatively appear from the record.").